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No. 384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GEORGE GENTILLI,

Petitioner,

v.

MORTIMER M. CAPLIN, Commissioner of Internal Revenue, DAVID C. ACHESON, United States Attorney for the District of Columbia, and ROBERT F. KENNEDY, Attorney General of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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Question Presented

The respondents' statement of the question presented does not mention the problem raised whether there exists an adequate remedy at law in the controversy, and fails to mention the presence therein of the question of the violation of a treaty and of the Fourth and Fifth Amendments to the Federal Constitution through foreign searches and seizures perpetrated or induced by American agents. (Resp. Br. 2; see Pet. 2.)

Statement

The statement of the case in the petition (P., 4, et seq) sufficiently sets forth the basic facts. As to the Statement of respondents (Resp. Br. 2, et seq), the following brief comments are made:

In respect of the remark (Resp. Br. 5) that the complaint did not allege that the petitioner "owned" any of the documents described—the complaint alleges (R. 5, 9, 12, 13)* that petitioner had a lawfully recognizable interest warranting protection in all the items seized; a proprietary interest and a right of privacy in the Italian bank accounts; a proprietary interest in records of an Italian corporation put in liquidation; and an enforceable right of secrecy in the arbitration documents—all such allegations being reinforced by high expert Italian affidavits attached to and incorporated into the complaint.[1] Irreparable injury in the premises was also alleged in the complaint (R. 3).

Concerning the statement (Resp. Br. 7) that no law of Italy was violated, even unintentionally, by any Federal representative or agent, attention is directed to the statements of Prof. Dondina (R. 30, 31, 32, 34, 35) showing the illegal nature in Italy of the acts of the former president of the Italian companies in converting corporate records to non-corporate use by delivery to the American agents; and to Article 110 of the Italian Criminal Code (P., 30), making participation in Italian crime itself an

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* "R." refers to the joint appendix filed in the Court of Appeals, unless otherwise indicated.

[1] See language of this Court in *Jones* v. *United States* (1960), 362 U.S. 257, at 266:

> ". . . We are persuaded, however, that it is unnessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . ."

offense. Likewise, the improper delivery of the secret arbitration documents constituted an illegal act in Italy (see affidavit of Prof. Dondina, R. 41), in which the American agents participated.

As to the bare statement (Resp. Br. 5) that the Attorney General wrote to the Italian Ministry of Justice requesting assistance in obtaining photostatic copies of petitioner's bank accounts, etc., the Attorney General in reality invoked primarily and completely out of context, the provisions of Article 658 of the Italian Code of Criminal Procedure, governing the manner of execution in Italy of criminal judicial letters rogatory coming from courts abroad (see text of relevant part of Article 658, P., 31); see request of Attorney General (R. 380); decision of Court of Appeal of Milan (R. 316-23, 325-6); also affidavit of Prof. Dondina at R. 24-5. No American judicial letters rogatory have been issued in the controversy. Where an American officer induces an unlawful act of seizure perpetrated by another, the taint of the seizure is attributed to him. *Gambino* v. *United States* (1927), 275 U.S. 310.

The continuing prolonged harassment of the petitioner by virtue of the respondents' wrongful possession of the seized documents is shown at R. 17-9, R. 380-3, R. 388-a and b, and R. 448-52 (Attachments Nos. 1 and 2 to Petition for Rehearing). No end of it is in sight except through the aid of equity.[2]

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[2] Although it is of minor consequence, respondents' reference (Resp. Br. 4) to "smuggling" operations thought to be carried on by certain Italian corporations, etc., by which the American customs agent at Milan (R. 190-2) may have meant "possible customs infractions," should be considered in the light of the summary judgment before trial and before completion of depositions, including those intended to be taken from Italian customs officials to show that there was no request to the agent for assistance. The reference (also Resp. Br. 4) to the payment of "more than $500,000 to the petitioner," likewise of little consequence at the present stage, is to something formally denied in the Tax Court pleadings.

Argument in Reply

(a) *The Court of Appeals Improperly Failed to Apply the Rule of* Silverthorne, *Which Requires Suppression of the Seized Items*

The disposition of the Court of Appeals was improper because it has left to the respondents the power to hold and use the unreasonably seized items indefinitely, and deprived the petitioner in the premises of his inherent right to an injunction suppressing the items and forbidding their use. It has been shown in the petition (P., 11) that this Court, under its rule in *Silverthorne Lumber Co.* v. *United States* (1920), 251 U.S. 385, requires the suppression for all purposes of unreasonably seized items of evidence; and that the Tax Court of the United States, to the pending action in which the petitioner has in effect been relegated by the Court of Appeals, lacks the equity powers (including the injunctive process) of a Federal tribunal. (P., 10).[3] If unreasonably seized items of evidence are being retained and exploited several years after the seizures, how can it be premature to suppress them? The rule complementary to that of Federal Rule of Criminal Procedure 41 (e), that equity at a pre-indictment stage (now somewhat reduced by *DiBella* v. *United States* (1962), 369 U.S. 121, to a stage, like the present one, where no criminal proceeding is "*in esse*") suppresses unreasonably searched and seized items seems to

[3] The misconstruction and misapplication by the Court of Appeals of *Reisman* v. *Caplin* (1964), 375 U.S. 440, has been shown in detail in the petition (P. 7-11). The statutory remedy deemed adequate in *Reisman* was elaborately articulated, and calculated to produce the identical relief there demanded (quashing of a subpoena duces tecum concerning items not in the Government's possession). The maximum remedy in the Tax Court in the present controversy would be mere exclusion from evidence of items which one or more of the present respondents have been exploiting for years through criminal menaces and expanding charges of civil penal liability for alleged tax fraud, already entailing irreparable injury, (R. 3-5), and which they could continue to exploit.

be so well fixed as not to be properly considered a rule of mere discretion. Application of the rule is specially indicated where the seized items are held and used by the Federal agents over a period of years with reference both to alleged crime and alleged civil liability to the Government.[4] See *Township of Hillsborough* v. *Cromwell* (1946), 326 U.S. 620, 629:

> "It follows *a fortiori* that the bill should not have been dismissed. As stated in *Greene* v. *Louisville & I. R. Co.*, 244 U.S. 499, 520, 'A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity.' . . ."

See also *Boyce* v. *Grundy* (1830), 3 Pet. (28 U.S.) 209, at 213:

> ". . . . It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity. . . ."

See further, *Watson* v. *Sutherland* (1866), 5 Wall. (72 U.S.) 74, at 79:

> "Commercial ruin . . . might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in . . . . The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings . . . [I]t is very clear that

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[4] Fraud is still being charged after six years, and further documents are being requested on the basis of the unreasonably seized ones (p. 3, *supra*). Criminal liability can be asserted anew at any time against an American outside the country (P., 10, *United States* v. *Foster* (C.A. 4, 1962), 309 F.2d 3 at 12-13).

the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued." [5]

(b) ***No Present Unlikelihood of Criminal Prosecution on the Basis of the Unreasonably Seized Items Diminishes the Right of Suppression Thereof***

This Court has said:

". ... It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings . . ." (*Bilokumsky* v. *Tod.* (1923), 263 U.S. 149, at 155)—

following a declaration by the Court that the deportation proceeding "was not a criminal one."

See also *Rogers* v. *United States* (CA 1, 1938), 97 F. 2d 691 at 692, where the defendant-appellant in an action of assumpsit against him by the United States for customs duties, objected to the admission into evidence of illegally seized imported whiskey; the Court of Appeals, relying on *Silverthorne, supra,* said:

"If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the Government in violation of the Fourth Amendment, we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid."

(c) ***The Point That Petitioner Does Not Pray in the Bill for the Return of Property to Him Is Immaterial***

In *McDonald* v. *United States* (1948), 335 U.S. 451, unreasonably seized evidence was suppressed as to the

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[5] The complaint in the case at bar alleges unconstitutional violations of petitioner's rights through unreasonable searches and seizures; prolonged harassment; and irreparable injury both financial and personal. (R. 2 et seq.)

movant, although not returnable to him, having been unlawfully taken from the premises of a co-defendant. Assuming *arguendo* that the movant "had no right of privacy that was broken," the Court still refused to allow him to suffer prejudice by the use of the evidence against him. (p. 456).

In *United States* v. *Jeffers* (1951), 342 U.S. 48, the seized property suppressed as to the movant was contraband not susceptible of a legal interest, and not returnable to him.

In *Jones* v. *United States* (1960), 362 U.S. 257, the seized property was again contraband not susceptible of a legal interest, and not returnable to the movant. The Court found standing, and declared that

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed . . ." (p. 261).

The relief prayed for in the complaint is variable and severable. (R. 14-16).

(d) ***The Suppression of the Evidence Would Not Be So Much the Upholding of Foreign Law as the Application of the Fourth Amendment in Respect of Foreign Acts Perpetrated or Induced by Federal Officers Against a United States Citizen Abroad***

Unless the language of Mr. Justice Black in *Reid* v. *Covert* (1957), 354 U.S. 1, 8-9,[6] is to remain a substantial vacuum in respect of foreign operation of the search

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[6] "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States . . . we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt not's' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments . . ."

and seizure clause of the Fourth Amendment, it seems necessary to apply the Fourth Amendment to acts of Federal officers abroad and to foreign acts induced by them, by appropriate reference to the foreign law of the place of the acts within the elastic purpose of the Clause to endow the citizen with the right of privacy—bearing in mind the unchallenged rule that:

> "A foreign sovereign cannot authorize his agents to violate the law in a foreign jurisdiction, or to perform any sovereign or governmental functions within the domain of another sovereign, without his consent." *United States* v. *Deutsches Kalisyndicat Gesellschaft* (DC NY 1929), 31 F. 2d 199 at 203.

See the language of Judge Prettyman, in *Eisentrager* v. *Forrestal* (CA DC 1949), 84 App. D.C. 396, 174 F. 2d 961, 965:

> "We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory. That is the nub of this whole matter. If the action of Government officials be beyond their constitutional power, it is for that reason a nullity. No more need be proven to establish its invalidity. Absent constitutional power, neither the objective nor the subject matter of an act is material . . ."

And at p. 967:

> "We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the acts of an official of the United States outside the territorial jurisdiction of . . . the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.
>
> "The question here is not whether a court, either state or federal, can exercise its judicial power with-

in the jurisdiction of another and independent government. The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government. We think that it can, if that be the only means of applying the Constitution to a given governmental action."

(e) *The Holding in* Burdeau *Does Not Apply*

As shown in the petition, in *Burdeau* v. *McDowell* (1921), 256 U.S. 460, the Court accepted without question the propriety of a pre-indictment bill for the suppression of documents seized for intended criminal use in respect of a proposed ~~second~~ indictment (~~p. 391~~), and then disposed of the case on what the Court conceived to be merits (P., 9). *Burdeau* was severely limited by *Gambino* v. *United States* (1927), 275 U.S. 310, in which the Court stated that *Burdeau* was based on the fact that "no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . ." (p. 318). In the instant case, the circumstances respecting the corporate documents speak for themselves, in that the American agents took photographic copies of original Italian corporate documents from one whom they knew to be the ousted president of the Italian companies (R. 257; 258; 205-7).[7]

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[7] As to the arbitration records, while the circumstances may have been less suspicious, the agents took these documents "to perform [a] . . . sovereign or governmental function[s] within the domain of another sovereign, without his consent." *Deutsches Kalisyndicat Gesellschaft, supra.*

As to the bank records, the petition has shown (P., 19) that the Italian Court, as its last act in the premises, found its earlier order of seizure to have been in error at Italian law (R. 325, 332-3) —bringing up the general rule that when two or more decisions of the same tribunal are not in accord with each other, the latter decision is controlling (P., 19).

(f) *The Treaty Was Violated By All the Seizures*

The Treaty provides in Article XVII that

> "The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or for the administration of statutory provisions against tax avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those (including a court) concerned with the assessment and collection of the taxes which are the subject of the present Convention or the determination of appeals in relation thereto. . . ."

It further provides (Article II):

> "(h) The term 'competent authorities' means, in the case of the United States, the Commissioner of Internal Revenue as authorized by the Secretary of the Treasury; and in the case of Italy, the Ministry of Finance, General Directorship for Direct Taxation."

Italian Treasury Circular No. 350300 provides:

> "The information which the two States are to exchange is that which, on the basis of the internal systems of the same, is available at each fiscal administration, provided always that there is excluded information which tends to the revelation of an industrial or commercial secret or process." (P., 28-30).[8]

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[8] Matters in Appendix B of the petition (beginning at P., 24), inclusive of provisions of Italian law, are also in the duly designated record (R. 412 et seq.). (Designation at R. 457). By arrangement with counsel for the respondents, they were placed in the appendices to the briefs below rather than in the joint appendix for readier reference, and placed in Appendix B to the petition for the same reason.

Prof. Dondina deposed (R. 25-6):

> "Moreover, when the subject matter is connected with taxes, the exchange of information between Italy and the United States of America can occur only in accordance with the provisions of Article 17 of the Convention signed in Washington on March 30, 1955, between the two countries. (It is to be noted that Article 17 states in part: 'The competent authorities of the contracting state shall exchange such information (being information available under the respective taxation laws of the contracting states) . . .' 'Competent authorities' are defined in Article 2 (h) for Italy as 'The Ministry of Finance, General Directorship for Direct Taxation.' 'Information available' is then that which the General Directorship for Taxation has effectively at hand and which it can lawfully use; but not that which, to obtain, it would have to conduct particular actions or procedures.)"

With particular reference to the seized bank records, he continues:

> "From the foregoing it results that if any step has been taken in Italy toward any act of examination with the procedure provided for the international rogatory commission in criminal matters, the said activity must be considered 'tanquam non esset,' because it was improperly carried out, with irremediable violation, whether of the rules of criminal procedure above referred to, or of the principle of liberty and respect of the human personality which the Italian system protects in respect not only of its own citizen but also of the alien. (See Article 16 of the Preliminary Rules of the Law in General, in connection with Article 10 of the Constitution.)"[9]

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[9] See opinion of Italian Court of Appeal (R. 332):

> ". . . And one could not possibly refer to and apply, before this Court, the Washington Convention of March 30, 1955, ratified and made enforceable in Italy under the Law of July 19, 1956 No. 943, which Convention does not concern criminal judicial investigation activities.

Conclusion

For the foregoing reasons, taken in conjunction with those set forth in the petition, it is respectfully urged that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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